Malayan Banking Bhd v Neway Development Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–336 OF 2009
RAUS SHARIF PCA, AZHAR MA'AH AND APANDI ALI JJCA
25 SEPTEMBER 2012

Contract — Agreement — Term loan agreement — Native land — Sale and purchase of native land — Whether agreement entered contravened provisions of Sabah Land Ordinance — Whether transaction illegal — Whether plaintiff innocent party, unaware of illegality — Whether agreement void

This was an appeal by the appellant ('plaintiff') against the decision of the High Court in dismissing its claim against the respondents ('defendants'). A property development company ('the fourth defendant'), planned to carry out a project known as 'Mixed Use Development Project' ('the project') on native lands in Penampang, Sabah ('the said lands'). However, ss 17(1) and 64(1) of the Sabah Land Ordinance ('Ordinance') prohibited the fourth defendant, a non-native, from 'dealing' with the said lands and from acquiring any interest in the said lands. In order to purchase the said lands, the fourth defendant sought the help of a native nominee ('Chin') to hold the said lands in trust, for and on its behalf. Subsequently, Chin entered into four separate sale and purchase agreements with the land owners for the total value of RM5.2m. Several trust deeds were prepared and executed in respect of the said lands in favor of the first defendant. The fourth defendant then became the beneficial owner of the native land. In order to part finance the purchase and develop the said land the fourth defendant sought banking facilities from the plaintiff and a term loan facility agreement was executed between the plaintiff and the fourth defendant amounting to RM2.8m. The fourth defendant also accepted a bridging loan facility for RM3.5m. However, the development project was frustrated and the plaintiff revoked the bridging loan on the ground that the first defendant failed to submit its application for drawdown within the availability period. The fourth defendant used Chin as its nominee to sell all the said lands in order to repay the amount due but a balance of RM1,715,956.32 was still owing. The plaintiff instituted an action against the first defendant claiming for the balance sum of the term loan facility. The defendants contended that the term loan was given specifically to 'part finance the purchase of a piece of land held under title No NT 213013480, District of Penampang Sabah' which was a native land, contravened s 17(1) of the Ordinance.

Held, dismissing the appeal with costs:

(1) In totality, the agreement was unlawful and unenforceable. The wordings

of s 17(1) of the Ordinance impose a bar on any dealings involving a non native on one part and a native on the other. The object or purpose of the term loan was such a nature that if permitted it would defeat the provisions of ss 17 (1) and 64(1) of the Ordinance. It was patently clear that the term loan agreement made between the plaintiff and the fourth defendant to facilitate the purchase of the native land was made in contravention of s 17(1) of the Ordinance. As a result, the agreement was tainted with illegality and forbidden by law (see para 24).

(2) The whole agreement became a void agreement within the meaning of ss 24 and 2(g) of the Contracts Act 1950 ('Act'). Since the whole transaction was tainted with illegality, all the other connected instruments executed pursuant to the agreement were also tainted with illegality (see para 24).

(3) It was evident that through the instrument of a trust deed, Chin purported to hold the native land in trust for the fourth defendant to enable the fourth defendant to purchase the native land through a non-native. This constituted 'dealing' within the definition of s 4 of the Ordinance. The court could not accede to the plaintiff's arguments as this would mean that creation of a trust deed to circumvent the provisions of s 17(1) of the Ordinance was valid. The proposition that the use of nominees (be it in the name of a trust) to circumvent the prohibition of dealings in the native lands between a non-native and a native is illegal and contravened ss 17(1) and 64(1) of the Ordinance (see paras 26–27).

(4) The plaintiff's contention that it was an innocent party who was unaware of the illegality cannot be accepted. No doubt there was no direct evidence to show that the plaintiff was aware of the illegality, but the plaintiff being an established financial institution should have investigated the legal status of the native land before entering into the term loan agreement with the fourth defendant. The term loan was illegal and s 66 of the Act was of no assistance to the plaintiff (see para 30).

[Bahasa Malaysia summary

Ini merupakan satu rayuan oleh perayu ('plaintif') terhadap keputusan Mahkamah Tinggi dalam menolak tuntutannya terhadap responden-responden ('defendan-defendan'). Sebuah syarikat pembangunan hartanah ('defendan keempat'), merancang untuk menjalankan satu projek dikenali sebagai 'Projek Pembangunan Pelbagai Guna' ('projek') ke atas tanah anak watan di Penampang, Sabah ('tanah-tanah tersebut'). Walau bagaimanapun, ss 17(1) dan 64(1) Ordinan Tanah Sabah ('Ordinan') melarang defendan keempat, yang bukan merupakan anak watan, daripada 'berurusan' dengan tanah-tanah tersebut dan daripada mendapatkan sebarang kepentingan ke atas tanah-tanah tersebut. Untuk membeli tanah-tanah

tersebut, defendan keempat memohon pertolongan daripada seorang penerima namaan anak watan ('Chin') untuk memegang tanah tersebut dalam amanah, untuk dan bagi pihaknya. Selepas itu, Chin memeterai empat perjanjian jual dan beli berasingan dengan pemilik-pemilik tanah untuk nilai keseluruhan sebanyak RM5.2 juta. Beberapa suratikatan amanah disediakan dan ditandatangani berhubung tanah-tanah tersebut bagi pihak defendan pertama. Defendan keempat kemudiannya menjadi pemilik benefisiari tanah anak watan. Bagi membiayai sebahagian jualan dan membangunkan tanah tersebut, defendan keempat memohon kemudahan perbankan daripada plaintif dan satu perjanjian kemudahan pinjaman berjangka dimeterai di antara plaintif dan defendan keempat berjumlah RM2.8 juta. Defendan keempat juga menerima satu kemudahan pinjaman sambungan sebanyak RM3.5 juta. Walau bagaimanapun, projek pembangunan tersebut telah dikecewakan dan plaintif membatalkan pinjaman sambungan atas alasan bahawa defendan pertama gagal untuk menyerahkan permohonannya untuk pengambilan dalam tempoh yang ditetapkan. Defendan keempat menggunakan Chin sebagai penerima namaannya untuk menjual kesemua tanah tersebut dengan tujuan untuk membayar jumlah perlu dibayar tetapi baki sebanyak RM1,715,956.32 masih terhutang. Plaintif memulakan satu tindakan terhadap defendan pertama menuntut baki jumlah kemudahan pinjaman berjangka. Defendan-defendan menghujah bahawa pinjaman berjangka telah diberikan khusus untuk 'membiayai sebahagian jualan sebidang tanah pegangan di bawah hakmilik No NT 213013480, Daerah Penampang Sabah' yang merupakan sebidang tanah anak watan, bercanggah dengan s 17(1) Ordinan.

Diputuskan, menolak rayuan dengan kos:

(1) Secara keseluruhannya, perjanjian tersebut adalah menyalahi undang-undang dan tidak boleh dikuatkuasakan. Perkataan-perkataan s 17(1) Ordinan mengenakan satu sekatan ke atas mana-mana urusan melibatkan seorang yang bukan merupakan anak watan dan seorang anak watan di pihak yang lain. Objektif atau tujuan pinjaman berjangka adalah bersifat sekiranya ia dibenarkan, ia akan membatalkan peruntukan ss 17(1) dan 64(1) Ordinan. Adalah jelas nyata bahawa perjanjian pinjaman berjangka yang dimeterai di antara plaintif dan defendan keempat untuk memudahkan pembelian tanah anak watan dibuat bercanggah dengan s 17(1) Ordinan. Akibatnya, perjanjian tersebut dicemari dengan ketaksahan dan dilarang oleh undang-undang (lihat perenggan 24).

(2) Keseluruhan perjanjian menjadi perjanjian tak sah dalam ertikata ss 24 dan 2(g) Akta Kontrak 1950 ('Akta'). Memandangkan keseluruhan transaksi dicemari dengan ketaksahan, instrumen-instrumen berkaitan lain yang dimeterai menurut perjanjian tersebut juga dicemari dengan ketaksahan (lihat perenggan).

(3) Jelas bahawa menerusi instrumen surat ikatan amanah, Chin bertujuan untuk memegang tanah anak watan dalam amanah untuk defendan keempat bagi membolehkan defendan keempat untuk membeli tanah anak watan melalui seseorang yang bukan merupakan anak watan. Ini merupakan 'berurusan' dalam definisi s 4 Ordinan. Mahkamah tidak boleh tunduk kepada hujah-hujah plaintif kerana ini bermakna bahawa penciptaan surat ikatan amanah untuk memintas peruntukan s 17(1) Ordinan adalah sah. Usul bahawa penggunaan penerima namaan (atas nama amanah) untuk memintas larangan berurusan dalam tanah-tanah watan di antara seorang yang bukan merupakan anak watan dan seorang anak watan adalah menyalahi undang-undang dan bercanggah dengan ss 17(1) dan 64(1) Ordinan (lihat perenggan 26–27).

(4) Hujah plaintif bahawa ia merupakan pihak yang tidak bersalah yang tidak sedar mengenai ketaksahan tersebut tidak boleh diterima. Tidak diragukan bahawa tiada keterangan secara langsung yang menunjukkan bahawa plaintif menyedari mengenai ketaksahan tersebut, tetapi plaintif sebagai institusi kewangan terkemuka sepatutnya menyiasat status sah tanah anak watan sebelum memeterai perjanjian pinjaman berjangka dengan defendan keempat. Pinjaman berjangka tersebut adalah menyalahi undang-undang dan ss 66 Akta Kontrak 1950 tidak dapat membantu plaintif (lihat perenggan 30).]

Cases referred to

Borneo Housing Mortgage Finance v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 261, HC (distd)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 144 (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356, SC (refd)
Menaka v Lum Kum Chum [1977] 1 MLJ 91, PC (refd)
OCBC Bank (Malaysia) Bhd vs Master Arc Sdn Bhd & 8 Others (unreported)(Civil Suit No K22–173 of 2000), HC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)
Specter v Ageda [1971] 3 All ER 417 (refd)
St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267, QBD (refd)
Tan Bing Hock v Abu Samah [1968] 1 MLJ 221 (refd)

Legislation referred to

Contracts Act 1950 ss 2(g), 24, 24(a), (b), 66
Sabah Land Ordinance (Cap 68) ss 4, 17(1), (4), 64(1)

Appeal from: Suit No K22–61 of 2002 (High Court, Kota Kinabalu)

Ronny Cham (Brenndon Soh with him) (Ronny Cham & Co) for the appellant. Baldev Singh (Baldev Gan & Associates) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned judicial commissioner ('JC') on 30 December 2008, in dismissing the appellant's claim against the respondents with costs.

[2] The appellant is the plaintiff and the respondents are the defendants. For convenience, parties will be referred to as the plaintiff and the defendants as in the court below.

BACKGROUND FACTS

[3] The relevant antecedent facts giving rise to this appeal are these. Sometime in 1996, the fourth defendant, a property development company, wanted to carry out a project known as 'Mixed Use Development Project' ('the project') on lands held under native titles NT213109490, NT213164928, NT213139630, and NT213013480 (said lands) located in the District of Penampang at Donggongon Township, Sabah. Since the said lands were classified as native land, the fourth defendant, a non native was prohibited by law from 'dealing' with the said lands and was prohibited from acquiring any interest in the said lands by virtue of ss 17(1) and 64(1) of the Sabah Land Ordinance ('Ordinance'). Hence, in order to purchase the said lands the fourth defendant sought the good help of a native nominee known as Chin Nyuk Fong ('Chin') to hold the said lands in trust, for and on its behalf.

[4] Pursuant to this arrangement, Chin entered into four separate sale and purchase agreements with the land owners for the total value of RM5.2m. Subsequently thereto several trust deeds were prepared and executed in respect of the said lands in favor of the first defendant, a company incorporated in Malaysia and the fourth defendant. The particulars of the trust deeds can be summarily set forth as follows:

(a) in respect of title NT213139630, Chin executed a trust deed dated 6 June 1997 in favour of the first defendant;

(b) in respect of title No NT213164928, Chin executed a trust deed dated 19 May 1997 in favour of the first defendant;

(c) in respect of title No NT213109490, Chin executed a trust deed dated 1 April 1997 in favor of the first defendant; and

(d) in respect of title No NT213013480, Chin executed a trust deed dated 30 October 1996 in favor of the fourth defendant.

[5] Pertinent to note that the particular trust deed for title No NT 213013480 (native land) which forms the subject matter of the dispute in this appeal was executed in favor of the fourth defendant alone. By virtue of this trust deed the fourth defendant became the beneficial owner of the native land. On 8 September 1997 Chin executed a power of attorney which was eventually revoked and replaced by another power of attorney dated 8 July 2002 which gave absolute power to the fourth defendant to sell, dispose, charge or in any way deal with the native land. In order to part finance the purchase and develop the said land the fourth defendant sought banking facilities from Mayban Finance Bhd (as it then was).

[6] Accordingly, a term loan facility agreement was executed between Mayban Finance Bhd and the fourth defendant on 30 January 1997 amounting to RM2.8m. The purpose of the loan was: *to part finance the purchase of a piece of land held under NT213013480, District of Penampang, Sabah*. A memorandum of charge dated 30 January 1997 was executed by Chin in favour of Mayban Finance for RM2.8m which was secured by a first legal third party charge over the native land.

[7] By its letter of offer dated 31 January 1997 Maybank Finance Bhd offered the fourth defendant a bridging loan facility for RM3.5m to part finance the infrastructure cost for the proposed commercial development on the said land. The fourth defendant accepted the bridging loan facility. However on the 31 March 1997, the fourth defendant entered into a deed of assignment with the first defendant, assigning absolutely all its benefits, rights, interest in the said land to the first defendant. By another deed of assignment dated 8 September 1997 the term loan facility of RM2.8m dated 30 January 1997 was absolutely assigned to the first defendant by the fourth defendant. This was done with the consent and knowledge of Maybank Finance Bhd. The second defendant and the third defendant being the directors of the first defendant and the fourth defendant executed two letters of guarantee dated 30 January 1997 and 8 July 1997 in favor of Maybank Finance as security for the term loan facility of RM2.8m and bridging loan facility of RM3.5m. The fourth defendant in turn issued a corporate guarantee in favor of Maybank Finance Bhd as a consideration for the term loan and bridging loan facility given to the first defendant. In addition to this Malayan Banking Bhd also granted to the first defendant an additional term loan facility of RM2.2m and a bridging loan facility of RM6m by its letter of offer dated 11 July 1997.

[8] Unfortunately, the development project was frustrated sometime in October 1998. Malayan Banking Bhd revoked the RM6m bridging loan dated 11 July 1997 allegedly on the ground that the first defendant failed to submit its application for drawdown within the availability period. Since the project was stalled, the first defendant had no alternative but to surrender the project to an interested party to minimise losses. Given the circumstances, the fourth defendant used its nominee Madam Chin to sell all the said lands in order to repay both the Malayan Banking Bhd and Mayban Finance Bhd. The proceeds of sale amounting to RM5.2m were used to settle in full the first defendant's entire debts owing to the Malayan Banking Bhd. The first defendant managed to settle the bridging loan facility of RM3.5m owing to Mayban Finance Bhd in full. The term loan facility of RM2.8m for the said land was however only settled in part. There was a balance of RM1,715,956.32 still owing to the Mayban Finance Bhd.

[9] By virtue of a vesting order dated 17 August 2004 granted by the High Court of Malaya at Kuala Lumpur, all rights, powers and interest including all legal proceedings of Maybank Finance Bhd was vested under Malayan Banking Bhd (the plaintiff). The term loan facility account of the first defendant now came within the purview of the Malayan Banking Bhd.

[10] Malayan Banking Bhd as the plaintiff instituted an action against the first defendants claiming for the balance sum of the term loan facility. The defendants resisted the claim stating that the term loan of RM2.8m granted by Maybank Finance Bhd (as it then was) to the fourth defendant originally and later assigned to the first defendant was given specifically to 'part finance the purchase of a piece of land held under title No NT 213013480, District of Penampang Sabah' which was a native land. This, according to the defendant was is in clear contravention of s 17(1) of the Ordinance. The learned JC after full trial dismissed the plaintiff's claim with costs.

FINDINGS OF THE HIGH COURT

[11] The learned JC in dismissing the plaintiff's claim held, inter alia:

(a) that the purchase of NT 213013480 by the fourth defendant is forbidden by law, unlawful and unenforceable as it contravenes s 17(1) of the Ordinance. The salient provision of s 17(1) of the Ordinance clearly prohibits any dealing made by the native on one part and a non native on the other part. Since the whole transaction was tainted with illegality; hence, the whole agreement is a void agreement by virtue of s 24(a)–(b) of the Contracts Act 1950. Consequently, all the other instruments connected with the agreement such as the deed of assignments and the letters of guarantee is also tainted with illegality (*Spector v Agenda* [1971] 3 All ER 417);

(b) that the term loan facility of RM2.8m which facilitated the purchase is also void for illegality (*Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 and *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356);

(c) that Chin had no beneficial interest in the said native land. She conspired with the fourth defendant to be used as an instrument to regularise an otherwise illegal transaction;

(d) that the plaintiff and the fourth defendant were in pari delicto in facilitating the illegal act by the plaintiff to deal with the native land and to acquire interest over the native land;

(e) that the trust deed created with the object of defeating the law is not a valid trust deed. The case of *Borneo Housing Mortgage Finance v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261 relied on by the plaintiff must be confined to its own peculiar facts and circumstances; and

(f) that s 66 of the Contracts Act 1950 will not aid the plaintiff as the plaintiff knew of the illegality from the outset. The plaintiff being an established financial institution whose business was to give out loans to the public should have at least investigated the legal status of the lands before entering into the term loan agreement with the fourth defendant.

SUBMISSIONS

[12] In short, the thrust of the plaintiff's argument was that the parties privy to the loan transaction did not contravene s 17(1) of the Ordinance as there was no registration of the native titles concerned in the name of the company, be it the first or the fourth defendant.

[13] The plaintiff's counsel argued that the purpose and creation of the purported trust deed to facilitate the term loan facility does not amount to 'dealing' as defined under s 4 of the Ordinance. Learned counsel reiterated further that the creation of a trust deed in this instant case fails outside the ambit of a 'dealing' as defined under s 4 of the Ordinance. Thus, the parties privy to the whole transaction are not in breach of s 17(1) of the Ordinance as a creation of a trust deed was not to be considered as a 'dealing' within the meaning of s 17(1) of the Ordinance. In support thereof learned counsel referred us to the case of *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261.

[14] Learned counsel for the plaintiff further submitted that the plaintiff was unaware of any illegality. In this regard, he submitted that the learned JG

erroneously found that the plaintiff knew or should have known that the contract entered into with the first defendant was illegal when there was no evidence led to suggest that the plaintiff was aware of any illegality. Alternatively, he submitted that even assuming that the whole transaction was illegal (which the plaintiff is vehemently denying), s 66 of the Contracts Act 1950 can be invoked by this court to assist the plaintiff. In support thereof he referred us to the case of *Menaka v Lum Kum Chum* [1977] 1 MLJ 91.

[15] Learned counsel for the defendants in their rebuttal argument conversely submitted that the plaintiff's contentions that the term loan agreement did not contravene s 17(1) of the Ordinance is misconceived in fact and in law as the Ordinance expressly prohibits the fourth defendant (being a non native) from 'dealing' with the native land. Learned counsel further submitted that, s 64(1) of the Ordinance also expressly prohibits a non native from acquiring any interest in native lands. In support thereof he referred us to the case of *OCBC Bank (Malaysia) Bhd v Master Arc Sdn Bhd & Ors* (unreported)(Civil Suit No K22–173 of 2000).

[16] Learned counsel strenuously argued before us that since the term loan was made in clear contravention of ss 17(1) and s 64(1) of the Ordinance; it is therefore illegal, unenforceable and void. Consequently, the personal guarantees of the second and third defendants and the corporate guarantee of the fourth defendant are all tainted with illegality, unenforceable and is a void instrument by virtue of s 24 and s 2(g) of the Contracts Act 1950. In support thereof he referred us to the case of *Specter v Ageda* [1971] 3 AII ER 417 at p 426.

[17] Learned counsel demonstrated to us that the sole and only purpose for which the said term loan was granted to the defendants were to enable a non-native to 'deal' with the said native land and to acquire the beneficial interest therein. The 'object' or purpose of the said term loan was of such a nature, that if permitted, it would defeat the provision of ss 17(1) and s 64(1) of the Ordinance.

[18] In a similar breath, learned counsel maintained that a contract to do an act illegal by statute, prohibited or forbidden by statute is unenforceable and illegal. The court will not enforce a contract which is expressly or impliedly prohibited by statute. In reference thereof he referred us to the cases of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (Federal Court) and *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (Supreme Court).

[19] Learned counsel then drew our attention to the fact that both the plaintiff and the fourth defendant were in pari delicto in entering into the said

term loan agreement which had its sole purpose to enable a non-native to acquire an interest in the said land. In the circumstance, he submitted that the plaintiffs cannot seek the assistance of the court to recover any balance of monies allegedly due to them. He referred us to the cases of *Tan Bing Hock v Abu Samah* [1968] 1 MLJ 221, *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21.

FINDINGS

[20] Upon considering the submissions of the parties in canvassing this appeal before us, the salient issues may be postulated as follows:

(a) whether the agreement entered by the plaintiff and the fourth defendant for the term loan of RM2.8m to facilitate the purchase of the native land by the fourth defendant using a native nominee contravenes s 17(1) of the Ordinance;

(b) whether the trust deed executed by Chin,the native nominee of the fourth defendant amounted to a 'dealing' within the definition of s 4 of the Ordinance; and

(c) whether if both the above issues are decided in the affirmative, the first, second, third and fourth defendants are bound to refund the monies owing to the plaintiff by virtue of s 66 of the Contracts Act 1950.

[21] In determining the first and second issues it may be useful to reproduce the relevant statutory provisions of the Ordinance pertaining to dealings in regards to native lands. Section 17(1) of the Ordinance reads as follows:

> 17(1) Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognized in any Court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

Section 64(1) of the Ordinance amplifies the above mention provision and it reads as follows:

> 64(1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of Section 17, or acquire any interest therein by way of charge or otherwise.

[22] The definition of what constitutes 'dealing' as circumscribed in s 17(1) of the Ordinance can be found in s 4 of the Ordinance which reads:

> 'dealing' means any transaction of whatever nature by which land is affected under this Ordinance.

[23] At the heart of this dispute lies the true interpretation to be placed on ss 17(1) and 64(1) of the Ordinance. The learned JC, applying the above provisions of the Ordinance made the following findings:

> On the surface there is nothing irregular about the transaction involving NT213013480. It is dealing between two willing natives. But the simple truth beneath the surface is the Chin Nyuk Fong was used by the fourth defendant to purchase NT 213013480. She had no beneficial interest whatsoever in the land. She did not even spend a single cent to purchase the land. The land was meant for the fourth defendant's project. She was merely an instrument to regularise an otherwise illegal transaction.

[24] We are inclined to agree with the above findings. We are of the view that the wordings of s 17(1) of the Ordinance impose a Bar on any dealings involving a non native on one part and a native on the other. The object or purpose of the term loan was such a nature that if permitted it would defeat the provisions of ss 17(1) and 64(1) of the Ordinance. Under that scheme of provision it is patently clear to us that the term loan agreement made between the plaintiff and the fourth defendant to facilitate the purchase of the native land was made in contravention of s 17(1) of the Ordinance. As a result, the agreement is tainted with illegality and forbidden by law. In totality, the agreement becomes unlawful and unenforceable (see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; *St John Shipping Corv Joseph Rank Ltd* [1957] 1 QB 267 and *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). Quite apart from this, the whole agreement also becomes a void agreement within the meaning of s 24 and s 2(g) of the Contracts Act 1950. Since the whole transaction is tainted with illegality, consequently all the other connected instruments such as the deed of assignments, letters of guarantee executed pursuant to the agreement are also tainted with illegality (see *Spencer v Agenda* [1971] 3 All ER 417).

[25] As for the second issue, we are of the view that that the creation of the trust deed did not legitimise the transaction as a whole. With respect, the heavy reliance on the case of *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261 is of no assistance to the plaintiff. We are of the view that the decision in *Borneo Housing Mortgage*'s case is confined to its own peculiar facts and circumstances. The issue that forms the core of the present appeal is distinguishable from the *Borneo Housing Mortgage*'s case.

[26] In this present appeal before us, it is evident that through the instrument of a trust deed Chin purported to hold the native land in trust for the fourth defendant to enable the fourth defendant to purchase the native land through a non-native. To us, this constitutes 'dealing' within the definition of s 4 of the Ordinance. As such, we cannot accede to the plaintiff's arguments as this will mean that creation of a trust deed to circumvent the provisions of

s 17(1) of the Ordinance is valid. This cannot be the intention of the legislators. Clearly, s 17(1) of the Ordinance prohibits any kind of dealings and this will include any trust deed created to circumvent the Ordinance. In this regard, we would like to refer to the case of *OCBC Bank (Malaysia) Bhd v Master Arc Sdn Bhd & 8 others* (unreported) (Civil Suit No K22–173 of 2000), wherein Justice Ian Chin J remarked the following:

> 'The Land Ordinance has a wider encompass in its definition where it defined the term in the following words' …any transaction of whatever nature by which land is affected under this ordinance …'. Clearly then an attempt by a trust deed would be one of the nature of dealing which s 17 of the Sabah Land Ordinance seeks to strike down.

[27] We accept the forgoing passage by the learned judge as a correct statement of law. In the premises, we affirm the proposition that the use of nominees (be it in the name of a trust) to circumvent the prohibition of dealings in the native lands between a non native and a native is illegal and contravenes ss 17(1) and s 64(1) of the Ordinance.

[28] Having said the above, we will now move on to the third issue. It is a question of whether s 66 of the Contracts Act 1950 is of any assistance to the plaintiff. Section 66 of the Contracts Act 1950 provides that:

> When an agreement is discovered to be void, or when a contract becomes void, any person who had received any advantage under the agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it.

[29] It is trite that the courts will not enforce nor grant any remedy under any illegal contract. However there are exceptions and one of which is when an innocent party is unaware of the illegality, (see *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 144 and *Menaka v Lum Kum Chum* [1977] 1 MLJ 91).

[30] On the facts and circumstances of this case, we are unable to accept the plaintiff's contention that it was an innocent party who was unaware of the illegality. No doubt there was no direct evidence lead to show that the plaintiff was aware of the illegality, but as rightly pointed out by the learned JC that the plaintiff being an established financial institution should have investigated the legal status of the native land before entering into the term loan agreement with the fourth defendant. Thus, we are in agreement with the learned JC, that the term loan was illegal and s 66 of the Contracts Act 1950 is of no assistance to the plaintiff. In this context it may be useful to refer to the case of *Tan Bing Hock v Abu Samah* [1968] 1 MLJ 221 and *Singma Sawmill Co Sdn Bhd v Asina Holdings (Industrilised Buildings) Sdn Bhd* [1980] 1 MLJ 21 relied upon the defendants' counsel.

[31] In conclusion, we would like to reiterate here, as we have alluded in the earlier part of this judgment that the salient provisions of s 17(1) of the Ordinance does not recognise any kind of dealings in the native lands in favour of a non native; save, and except by way of a charge in favor of a financial institution, which is permitted under s 17(4) of the Ordinance. We are minded of the fact that in determining issues pertaining to native rights under s 17(1) of the Ordinance it is incumbent upon the court to accord its provision a strict construction. We are of the considered view that any other construction especially one that places a meaning otherwise that what that was subscribed may result in judicial disobedience to the will of the Parliament.

[32] In the circumstances, we are unanimous in our decision that this appeal must fail. We therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Ibnu Aswan